Supreme Court, U.S.
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No.

IN THE
SUPREME COURT of the UNITED STATES

Robert W. Grine II, Joanne D. Grine, Estate of Margaret M. Grine,
Petitioners

vs.

WILLIAM R. COOMBS; BILLIE M. YOST; JACK W. SHRUM, ET UX; ROTOCAST PLASTIC; ESSEX ENVIRONMENTAL INDUSTRIES, INC.; TIONESTA BOROUGH COUNCIL; RONALD HALL, President of Borough Council, in an individual and official capacity; SCOTT DAUM, Borough Manager of Tionesta, in an individual and official capacity; COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION ("DEP"); GARY WOZNIAK, in an individual and official capacity as an agent of the DEP; DANIEL HOLLER, Emergency Response Coordinator, Northwest Region, in an individual and official capacity, as an agent of the DEP; RONALD W. COOMBS, Executor of the Estate of WILLIAM R. COOMBS, DECEASED; UNITED STATES OF AMERICA ENVIRONMENTAL PROTECTION AGENCY (EPA); MICHAEL MCCABE, Regional Administrator, Region III, U.S. EPA;
Respondents

On Petition for a Writ of Certiorari
To the Third Circuit Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the Third Circuit Court of Appeals erred and violated the Petitioners' fundamental rights to due process when it affirmed the lower court's order summarily excluding all Commonwealth Defendants from the scope of a contempt hearing, on grounds that the lower court lacked jurisdiction over the contemnors because it had granted the government's motion for dismissal?

II. Whether the Third Circuit Court of Appeals erred and infringed upon the Petitioners' fundamental rights to due process when it affirmed the lower court, which had ruled that the only possible grounds for a finding of civil contempt was the alleged contemnor's violation of a per-se order?

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IN THE
SUPREME COURT of the UNITED STATES

OCTOBER TERM, _____

Robert W. Grine II, Joanne D. Grine, and the
Estate of Margaret M. Grine,
Petitioners

Vs.

The Estate of William R. Coombs, et al,
Respondents

Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Third Circuit

Petitioners, Robert W. Grine II, Joanne D. Grine, and the Estate of Margaret M. Grine, respectfully pray that a writ of certiorari issue to review the order of the United States Court of Appeal for the Third Circuit entered in this proceeding on October 1, 1999.

OPINIONS BELOW

The opinion and decision of the United States Court of Appeals affirming the district court's memorandum order of August 17, 1998 appears at Appendix A and it is unreported. (App. A.) The decision of the U.S. Court of Appeals denying the timely filed petition for rehearing appears at Appendix B (App. B.) and it is unreported. The district court's memorandum opinion and order appears at Appendix C (App. C.) and is unreported.

GROUNDS FOR JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The order of the United States Court of Appeals affirming the district court's order of August 17, 1998 (excluding the Commonwealth of Pennsylvania Department of Environmental Protection from the possibility of sanctions in a contempt hearing) was issued on July 15, 1999. The Court of Appeals denied Petitioners timely Petition for Rehearing on October 1, 1999. The certified copy of the judgement was issued in lieu of a formal mandate on October 12, 1999.

The question presented did not arise until Petitioners received the Third Circuit Court of Appeals' opinion and judgement affirming the District Court's order of August 17, 1998, excluding the Commonwealth defendants from a contempt hearing.

Petitioners thereupon sought rehearing and argued that the Court of Appeals had erred for numerous reasons and that its decision resulted in fundamental unfairness and a violation of the due process clause of the federal constitution.

The jurisdiction of the United States District Court for the Western District of Pennsylvania was invoked pursuant to 28 U.S.C. §1331.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case concerns the Fifth Amendment to the United States Constitution which provides, in pertinent part, that "No personal shall . . . be deprived of life, liberty, or property, without due process of law; . . ."

STATEMENT OF THE CASE

Petitioners' initial complaint was filed on December 21, 1995; their Amended Complaint was filed on April 2, 1996. Petitioners are Robert W. Grine, II, Joanne D. Grine, and the Estate of Margaret M. Grine; Defendants are William R. Coombs; Billie M. Yost; Jack Shrum, et. ux.; Essex Environmental Industries, Inc.; Rotocast Plastic Products, Inc.; Tionesta Borough Council, Ronald hall, President of Borough Council, in an individual and official capacity; Scott Daum, Borough Manager of Tionesta, in an individual and official capacity; Commonwealth of Pennsylvania, Department of Environmental Protection; Daniel Holler, Emergency Response Coordinator, Northwest Region, in an individual and official capacity; Gary Wozniak, in an individual and official capacity; United States of America Environmental Protection and Michael McCabe, Regional Administrator, Region III, U.S. EPA.

Petitioners brought suit under the Resource Conservation and Recovery Act of 1976 ("RCRA"), 42 U.S.C. §6901 et. seq., the Federal Water Pollution Control Act ("Clean Water Act"), 33 U.S.C. §1251 et. seq., and the Comprehensive Environmental Response, Compensation, and Liabilities Act of 1980 ("CERCLA"), 42 U.S. C. §9601 et. seq., as amended by the Superfund Amendments and Reauthorization act of 1986. Petitioners also brought suit against the US EPA and its Region III Director under the Freedom of Information Act, 5 U.S.C. §552. The Amended Complaint also assets causes of action under the state common-law theories of intentional infliction of emotional distress, trespass, nuisance and strict liability, as well as a claim pursuant to the Pennsylvania Hazardous Sites Cleanup Act ("PHSCA"), 35 Pa. Stat. Tit. 35, §6020.101 et seq.

Petitioners were the victims of rogue or midnight dumping of acutely hazardous toxic substances transported in federally-licensed overpack drums abandoned in close proximity to their home and private water supply. After they sued individual owners of the site, transporters, corporate entities who generated the waste, and government agencies which had failed to investigate the nature and extent of the contamination, Petitioners became the targets of a grand jury convened to investigate the commission of an environmental crime, and were surveilled by federal agents.

In September of 1998, Petitioners filed their Notice of Appeal at No. 98-3494 of two interlocutory orders issued by the District Court. Petitioners appealed from the Order of August 17, 1998, denying Plaintiffs' Motion for Reconsideration of the Court's Order of February 9, 1998, excluding the Commonwealth of Pennsylvania's Department of Environmental Protection from the possibility of sanctions in a contempt hearing.

The cause was remanded to the District Court for further proceedings in accord with the appellate court's order of July 15, 1999; the appellate court affirmed a portion of the order of August 17, 1998.

Petitioners had motioned for an order adjudging Defendant United States Environmental Protection Agency ("USEPA") and Defendant Pennsylvania Dept. of Environmental Protection ("PADEP") in civil contempt on December 15, 1997; Petitioners maintained that the PADEP conducted a series of tests on the site (i.e., the Coombs site) where hazardous materials were released into the environment and attempted to withhold the results from the Plaintiffs. During the status conference of November 13, 1996, the Commonwealth's attorney stated for the record, in response to direct questioning by the court, that 'we [the PADEP] have given them everything."

Petitioners subsequently discovered, through their reading of the U.S. EPA's Reports of Investigation ("ROI's") authored by Special Agent, Martin Wright, that numerous PADEP test results and documents referred to by Agent Wright in his ROI's and relied upon for his conclusions in those reports, were never released to the Plaintiffs in their entirety. For example, the ROI of November 4, 1994, makes reference to samples procured on the Coombs site prior to that date by a DEP agent. Analytical results pertaining to those DEP procured samples were never released to Plaintiffs. In the ROI of April 27, 1995, Agent Wright stated that on August 3, 1995, the DEP conducted field sampling on the Coombs site. Full documentation pertaining to this event was never released to Plaintiffs. Thus test events relied upon by Agent Wright in his ROI's for conclusions reached in a criminal investigation were never documented for the record and were never provided to the Plaintiffs for their inspection.

In an interview with the defendant accused of bringing overpack drums to the site, conducted by Agent Martin Wright on September 11, 1995, Wright stated that he had been informed that the DEP procured samples from the overpack drums on the Coombs site in early August of 1995. The DEP never acknowledged to Plaintiffs or to the Court that such an event took place.

Plaintiffs requested that all documents pertaining to sampling events be released to them forthwith.

Petitioners requested that the PADEP be held in contempt and sanctioned for its failure to comply with the court's directive to make the entire record available to them. Petitioners also requested that the PADEP be sanctioned because its counsel stated flatly to the Court that the record in its entirety had been made accessible to Plaintiffs. A supplemental brief in support of Petitioners' motion was filed on March 9, 1998; Petitioners indicated therein that the

PADEP had withheld, in flagrant violation of its promises and representations to Petitioners and to the District Court, information crucial to validation of DEP-procured test results.

On February 9, 1998, the District Court issued an order summarily excluding the PADEP from the possibility of sanctions in a contempt hearing on grounds that the PADEP had previously been dismissed from the case.

Plaintiffs moved for reconsideration of these orders on February 21, 1998. On August 17, 1998, the District Court amended its order of December 31, 1996, but in all other respects the Plaintiffs' motion for reconsideration was denied.

The District Court in its Memorandum Opinion of August 17, 1998, concluded that it lacked jurisdiction over the Commonwealth Defendants because the Court had granted their Motion to Dismiss the Plaintiffs' Amended Complaint. The District Court stated that the PADEP's withholding and destruction of data did not relate to any cause of action as pleaded in the Plaintiffs' Amended Complaint.

The District Court also stated that the Commonwealth Defendants were not in violation of any court order and that if they had lied to the Court, such conduct could not serve as a basis for contempt. Though the Court recognized that the PADEP had stated it had released all data to Petitioners when in fact it had failed to do so, the Court did not recognize this as conduct which would serve as a basis for a finding of contempt.

The District Court did not debate or contest that the Commonwealth had deliberately misrepresented its actions to the Court; it stated instead that such language did not

create a jurisdictional basis for finding the PADEP in civil contempt.

Petitioners in their appeal to the Third Circuit argued that the lower court erred in ruling that it lacked jurisdiction over the PADEP following the court's granting of their motion to dismiss the Plaintiffs' Amended Complaint; Petitioners argued that the District Court also erred in ruling that the deliberate proffering of false statements in the presence of the court cannot serve as a basis for a finding of civil contempt.

On July 15, 1999, the third Circuit Court of Appeals in its Opinion affirmed the order of the District Court excluding the Commonwealth Defendants from the contempt hearing.

The appeals court affirmed on grounds that no per-se order had been violated by the PADEP, and urged that only violation of a per-se order could support the sanction of contempt.

REASONS FOR GRANTING THE WRIT

I. The decision of the Third Circuit Court of Appeals conflicts with this Court's precedents and with settled law on the Third Circuit.

"It has long been recognized that courts are vested with certain inherent powers that are not conferred either by Article III or by statute, but rather are necessary to all other functions. U.S. v. Hudson, 7 Cranch (11 U.S.) 32, 34, 3 L. Ed. 259 (1812); Roadway Express, Inc. v. Piper, 447 U.S. 752, 764, 100 S. Ct. 2455, 2463, 65 L. Ed. 2d 488 (1980). Of course, implicit in all these powers is the power to sanction." In re Orthopedic Products Liab. Litigation, 132 F. 3d 152, 156 (Emphasis supplied.) (3rd Cir. 1997).

The Court of Appeals affirmed a ruling which is manifestly in error; granting of a government motion to dismiss does not defeat the court's jurisdiction to punish the government for bad faith conduct; i.e., deceit and the working of a fraud on the court. The Supreme Court has unambiguously held that jurisdiction to punish for contempt attaches upon the commission of the offense and is not lost by the contemnor's flight from the courtroom. See Ex parte Terry, 128 U.S. 289, 9 S. Ct. 77, 32 L. Ed. 405 (1988); Imprisoned Citizens Union v. Shapp, 11 F. Supp. 2d 586 (E.D. Pa. 1988), aff'd. 169 F. 3d 178 (3rd Cir. 1999).

"A court may make an adjudication of contempt and impose a contempt sanction even after the action in which the contempt arose has been terminated. See United States v. Mine Workers, 330 U.S. 258, 294 91 L. Ed 884, 67 S. Ct. 677 (1947) . . ." Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 110 L. Ed. 2d 359, 375, 396, 110 S. Ct. 2447 (1990). And see: Gompers v. Bucks Stove & Range Co., 55 L. Ed. 797, 31 S. Ct. 492, 221 U.S. 418, 451 (1911).

The inherent power of the court "reaches both conduct before the court and beyond the court's confines," and may properly be invoked to sanction willful bad faith conduct committed in an attempt to perpetuate fraud on the court. See, e.g., Chambers v. NASCO, Inc., 111 S. Ct. 2123 (1991); Hazel-Atlas Glass Co. v. Hartford Empire Co., 88 L. Ed. 1250 (1944); A federal court must invoke its inherent powers when necessary to protect its ability to function; this not only includes the power to impose on litigants in its presence basic respect for the truth, but also encompasses the power to issue directives necessary to facilitate activity authorized by statute or rule. The court retains its inherent power to modify judgements and to enter a finding of contempt even after the original case has been closed. See Sizzler Family Steakhouses v. Westrn Sizzling Steak House, Inc., 793 F. 2d 1529 (11th Cir. 1986), reh. den. 797 F. 2d 982. A federal court's power to punish for contempt extends to those cases involving misbehavior of any person in its presence, or so near thereto as to obstruct the administration of justice. See Jones v. Clinton, 72 F. 3d 1354 (8th Cir. 1996), reh. and sugg. for reh. den., 81 F. 3d 78, cert. granted 116 S. Ct. 2545, aff'd. 117 S. Ct. 1636, on remand 974 F. Supp. 712, on remand 990 F. Supp. 657, appeal dismissed and remanded 138 F. 3d 758.

"Every district court has the power to conduct an independent investigation in order to determine whether it has been the victim of fraud. Chambers v. NASCO, Inc., 501 U.S. 32, 44, 111 S. Ct. 2123, 2132, 115 L. Ed. 2d 27 (1991) (citing Universal Oil Prod. Co. v. Root Ref. Co., 328 U.S. 575, 66 S. Ct. 1176, 90 L. Ed. 1447 (1946))." In re E.I. du Pont de Nemours & Co. – Benlate Litigation, 99 F. 3d 363, 367 (11th Cir. 1996).

The district court in the instant case did nothing to investigate the Petitioners' allegations that the Commonwealth defendants had compromised a federal

criminal investigation and flouted the authority of the district court by making false statements in its presence as to the governments' dissemination of the public record. The district court "was free to vacate its earlier judgement, in whole or in part, and to resume proceedings on the same jurisdictional basis it possessed in the underlying case. See Chambers, 501 U.S. at 44, 111 S. Ct. at 2132. Of particular relevance here, the inherent power also allows a federal court to vacate its own judgement upon proof that a fraud has been perpetrated upon the court. (Citing Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 64 S. Ct. 997, 88 L. Ed. 1250 (1994); Universal Oil, 328 U.S. at 580, 66 S. Ct. at 1179)." Dupont de Nemours, at 367, 368.

"The inherent power of a federal court to investigate whether a judgement was obtained by fraud, is beyond question. Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 88 L. Ed. 1250, 64 S. Ct. 997. The power to unearth such a fraud is the power to unearth it effectively. Accordingly, a federal court may bring before it by appropriate means all those who may be affected by the outcome of its investigation." Universal Oil Products co. v. Root Ref. Co., 90 L. Ed. 1447, 1452 (1946) (Emphasis supplied.).

The District Court did nothing to investigate perpetration of a fraud on the court by the government. The District Court possessed inherent power and jurisdiction to entertain the Petitioners' motion to hold the Commonwealth in civil contempt, to hear evidence, and to vacate its own judgements, if necessary.

"That the power to punish for contempts is inherent in all courts, has been many times decided and may be regarded as settled law. It is essential to the administration of justice. The courts of the United States, when called into existence and vested with jurisdiction over any subject, at once became possessed of the power." Michaelson v. United States ex.

rel. Chicago, St. P., M., & O.R. Co., 266 U.S. 42, 65-66, 69 L. Ed. 162, 45 S. Ct. 18 (1924).

The contempt power "has been uniformly held to be necessary to the protection of the court from insults and oppressions while in the ordinary course of its duties, and to enable it to enforce its judgements and orders necessary to the due administration of law and the protection of the rights of suitors." Bessette v. W. B. Conkey Co., 194 U.S. 324, 333 (1904) (Emphasis supplied.) And see: Ex parte Robinson, 19 Wall 505, 510 (1874); Anderson v. Dunn, 6 Wheat 204, 227 (1821).

Contempt proceedings "are not intended to punish conduct prescribed as harmful by the general criminal laws. Rather, they are designed to serve the limited purpose of vindicating the authority of the court. In punishing contempt, the Judiciary is sanctioning conduct that violates specific duties imposed by the court itself, arising directly from the parties' participation in judicial proceedings." Young v. U.S. ex rel. Vuitton et Fils S.A., 95 L.Ed. 2d 740, 754, 107 S. Ct. 2124 (1987) at 754 (Footnote omitted.). The court has jurisdiction in a contempt proceeding "over those particular persons whose legal obligations result from their earlier participation in proceedings before the court." Vuitton, at 754, Ftn. 10.

Words spoken or acts committed within the presence of the court, either while the court is in session or during its intermissions, which tend to subvert, embarrass, or prevent justice, are termed 'direct' contempts and may be punished summarily.

Jurisdiction of the person thus attaches instantly upon the contempt, and jurisdiction is neither surrendered nor lost by delay on the part of the court in exercising its powers to proceed. Terry.

". . .[W]hile the exercise of the contempt power is subject to reasonable regulations, 'the attributes which inhere in that power and are inseparable from it can neither be abrogated nor rendered practically inoperative. Vuitton, at 753, citing Michaelson, at 66.

II. The decision of the Court of Appeals should be reviewed because it erodes public confidence in the integrity of the judicial process.

The government was cited for contempt because it made gross misrepresentations of fact to the court when questioned by the court. Justice Cardozo remarked in Clark v. United States, 77 L. Ed. 993, 998, 999 (1933), "that obstruction to judicial power will not lose the quality of contempt though one of its aggravations be the commission of perjury . . . . deceit by an attorney may be punished as a contempt if the deceit is an abuse of the functions of his office."

"An obstruction to the performance of judicial duty resulting from an act done in the presence of the court is . . . the characteristic upon which the power to punish for contempt must rest. White, Ch. J., in Ex parte Hudgings, 249 U.S. 378, 383, 63 l. Ed. 656, 658, 39 S. Ct. 337, 11 A.L.R. 333." Clark, 998. Absence of veracity is punishable in contempt.

Perjury or false swearing may constitute contempt of court, because it inherently affects and impedes the administration of justice. See Hudgings; Re Kaplan Bros. 213 F. 753, cert. den. 234 U.S. 765, 58 L. Ed. 1582 (3rd Cir. Pa. 1914); Re Eskay, 122 F. 2d 819 (3rd Cir. J.J. 1941); Re Presentment by Grand Jury, 133 F. 2d 903 (3rd Cir. Del. 1943).

"Our legal systems will endure only so long as members of society believe that our courts endeavor to provide untainted, unbiased forums in which justice may be found and done. Thus, it is beyond peradventure that district courts have

broad authority to preserve and protect their essential functions." Republic of Philippines v. Westinghouse Elec. Corp., 46 F. 3d 65, 73 (3rd Cir. 1994).

The Federal Rules of Civil Procedure (e.g., Fed. R. Civ. P. 11, 16(f), 26(g), 30(g), 37(d) and 37(g), 41(h), 45(f), and 56(g), and federal statutes (e.g., 18 U.S.C. §401, 28 U.S.C. §1927) allow district courts to impose sanctions upon those who would abuse the judicial process.

However, "these formal rules and legislative dictates [do not] exhaust district courts' power to control misbehaving litigants. To the contrary, the Supreme Court recently reaffirmed that a district court has inherent authority to impose sanctions upon those who would abuse the judicial process." Westinghouse, at 73.

A federal district court's inherent power to impose sanctions for bad faith litigation conduct is not displaced by the sanction scheme of statute and rules.

"Neither statute nor the Federal Rules of Civil Procedure supplant, however, the implicit inherent power of the court – perhaps the mother source of the authority and responsibility of the courts to control the conduct of litigation – to restrain excesses of the participants and to preserve the integrity of the judicial process. Chambers, 501 U.S. at 46, 111 S. Ct. at 2133-34; . . ." Derzack v. County of Allegheny, 173 F.R.D. 400, 411 (W.D. of Pa. 1996).

The ability to impose sanctions does not depend solely and exclusively upon whether or not a per-se court order has been violated. The district court need not order the Commonwealth's agents to refrain from falsifying the public record in its presence or making false statements for those acts to be punishable. The legal obligation to refrain from

committing such acts is imposed upon every party to a lawsuit.

A lawyer cannot "honorably be a party to or in any way give aid to presenting known perjury." Nix v. Whiteside, 106 S. Ct. 988, 89 L. Ed. 2d 123, 137 (1986).

The government was cited for contempt because it lied to the court, in addition to failing to abide by the court's directives. Petitioners most definitely made reference to an order of the type necessary to support civil contempt. Harris v. City of Phila., 47 F. 3d 1342, 1349 (3d Cir. 1995) is not controlling in this context. The Commonwealth lied to the Court and ignored the Court's directive for them to produce and make available to Plaintiffs in its entirety the record of the government's site investigation.

The Commonwealth maintained that it had fully complied with this duty when it had instead deliberately withheld crucial data and kept it off the books, for its eyes only.

If a fraud occurs in the context of a court-ordered or court-monitored discovery, and such misconduct constitutes a fraud on the court, such conduct most directly implicates the inherent power of the court to curb excesses, and warrants invocation of its power to sanction responsible parties.

". . .[W]hen rules alone do not provide courts with sufficient authority to protect their integrity and prevent abuses of the judicial process, the inherent power fills the gap." Jones v. Clinton, 36 F. Supp. 2d 1118 (E.D. Ark. 1999) citing Shepherd v. American Broadcasting Companies, Inc., 62 F. 3d 1469, 1474 (D.C. Cir. 1995) (citing Chambers, 501 U.S. at 46, 111 S. Ct. 2123). A court has the inherent power to protect its integrity and prevent abuses of the judicial process.

The Commonwealth's counsel maintained that the Commonwealth had turned over all test data to Plaintiffs in the context of a judicial pre-trial conference. However, the Commonwealth was aware that much crucial data had been effectively hidden from and never released to the Plaintiffs; such intentional improper conduct was certainly within the penumbra of the court's authority (and at the hands-on supervision of the district court in this particular judicial setting).

Formal rules and legislative dictates do not exhaust a district court's power to control misbehaving litigants; a district court has inherent powers to control those who would abuse the judicial process. Republic of Phillipines.

The government has no special or elevated status; no attorney has carte blanche to misrepresent evidence of record to the court.

The Court of Appeals erred in stating that "the Petitioners did not point to an order of the type necessary to support civil contempt." (App. A, at 10) (Emphasis supplied.) Petitioners indicated in considerable detail the dates and occasions when the court directed and monitored the PADEP's release of test data to Petitioners. In addition to this failure to contemplate the record, the appellate panel ignored precedent when it suggested that it is only the violation of a per-se order which can threaten the integrity of proceedings before the court.

A litigant is not free to violate a per-se order; neither is he or she free to commit perjury, falsify a federal agency's investigative reports, and withhold crucial evidence of an environmental crime, without facing repercussions from the court upon which it has worked a fraud. The Third Circuit Court of Appeals ruled that the PADEP was immunized from the district court's power to maintain the integrity of its

processes unless it was caught in flagrant violation of a per-se order.

The District Court did order the PADEP to produce the public record for inspection by the Plaintiffs in the hearing for injunctive relief of May 31, 1996.

It did not "order" the PADEP's counsel not to lie when making representations to the Court and to the Plaintiff-Petitioners concerning the completeness of the public record. Nevertheless, it was still incumbent on the Commonwealth not to make false statements to a judge.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Dated: December 22, 1999

Respectfully submitted,

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APPENDIX

Appendix A	Opinion and Decision of Third Circuit Court of Appeals Partially Affirming the District Court's Order of August 17, 1998.
Appendix B	Decision of the United States Court of Appeals Denying the Petition for Rehearing.
Appendix C	District Court Memorandum Opinion and Order of August 17, 1998

UNREPORTED – NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 98-3494

ROBERT W. GRINE, II; JOANNE D. GRINE;
and Estate of MARGARET M. GRINE
Appellants

v.

WILLIAM R. COOMBS; BILLIE M. YOST; JACK W. SHRUM, et. ux.; ROTOCAST PLASTIC; ESSEX ENV. IND. INC.; TIONESTA BOROUGH COUNCIL; RONALD HALL, President of Borough Council, in an individual and official capacity; SCOTT DAUM, Borough Manager of Tionesta, in an individual and official capacity; COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION ("DEP"); GARY WOZNIAK, in an individual and official capacity as an agent of the DEP; DANIEL HOLLER, Emergency Response Coordinator, Northwest Region, in an individual and official capacity, as agent of the DEP; RONALD W. COOMBS, Executor of the Estate of WILLIAM R. COOMBS, Deceased; USA ENV PROTECTION; MICHAEL McCABE, Regional Administrator, Region III, U.S. E.P.A.,

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA
(D.C. Civ. No. 95-cv-00342)
District Judge: Honorable Sean J. McLaughlin

Argued May 4, 1999
Before: ALDISERT, WEIS and STAPLETON, Circuit Judges
Filed: July 15, 1999

APPENDIX A

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Office of General Counsel
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OPINION OF THE COURT

WEIS, Circuit Judge.

Plaintiffs, Robert W. Grine, II, his wife Joanne, and his mother Margaret (now deceased), owned and lived on property in Tionesta Borough, Pennsylvania. Their land adjoined a tract owned at one time by defendant William R. Coombs (now deceased). In the spring of 1993, hazardous waste allegedly migrated to the plaintiffs' property from barrels located on Coombs' tract, causing damage to their land and living environment.

In December of 1995, plaintiffs filed suit in the United States District Court for the Western District of Pennsylvania. In April of 1996, they amended their complaint to assert causes of action under the Resource, Conservation, and Recovery Act ("RCRA"), 42 U.S. C. § 6901, et. seq., the Water Pollution Control Act ("Clean Water Act"), 33 U.S.C. §1251, et seq., and the Comprehensive Environmental Response Compensation and Liabilities Act ("CERCLA"), 42 U.S.C. § 9601, et seq. In

addition, the amended complaint listed counts under the Free of Information Act, state common law, and the Pennsylvania Hazardous Sites Cleanup Act, 35 P.S. § 6020.101, et seq.

Plaintiffs sued parties who owned the Coombs' land and the offending barrels. Also named were those later moved the waste to an unknown site to those who increased the waste run-off after plaintiffs sought aid from state and federal environmental officials. Defendants included the Pennsylvania Department of Environmental Protection, and two of its officials, Gary Wozniak and Daniel Holler ("Commonwealth defendants"), as well as the Regional Administrator of the United States Environmental Protection Agency.

On December 31, 1996, citing Fed. R. Civ. P. 12(b)(1) and 12(b)(6), the District Court dismissed the claims against the Commonwealth defendants as immune from suit under the Eleventh Amendment. Although according to their caption, plaintiffs purported to sue Wozniak and Holler in their individual capacities, the Court observed that the substance of the amended complaint equated them with the state agency and did not refer to any action taken in an individual capacity. Accordingly, the claims were actually against the Commonwealth, triggering its constitutional immunity.

The District Court noted that Ex parte Young, 209 U.S. 123 (1908), would otherwise permit claims for prospective injunctive relief against state officials. Here, however, the amended complaint described only past activity, failed to allege continuing federal violations and requested damages, a form of relief unavailable under Ex parte Young. Moreover, plaintiffs were apparently complaining that Wozniak and Holler had not adequately enforced the environmental laws, a discretionary decision beyond the reach of Ex parte Young.

Finally, citing Pennhurst State School and Hospital v. Halderman, 465 U.S. 89 (1984), the District Court held that the Eleventh Amendment additionally deprived it of jurisdiction over the state law claims asserted against the Commonwealth defendants. Accordingly, the District Court dismissed all claims against them with prejudice. Plaintiffs' appeal to this Court was dismissed for lack of appellate jurisdiction because no final order had been entered under Rule 54(b).

Plaintiffs then filed a Motion for Reconsideration in the District Court, and on August 17, 1998, the prior order was modified to provide that the plaintiffs' state law claims against the Commonwealth defendants would be dismissed "without prejudice." Again, however, the District Court rejected the plaintiffs' contentions that they were entitled to relief under Ex parte Young. The Court reasoned that plaintiffs suffered no harm from the officials actions in assisting in the removal of hazardous substances from the Coombs' property. Consequently, they lacked standing to assert a violation of the RCRA. The Court left intact its prior decision to dismiss the federal claims against the Commonwealth defendants with prejudice.

In this appeal, in an effort to invoke Ex parte Young, plaintiffs contend that certain actions of Wozniak and Holler – particularly engaging in the illegal handling, storage and transport of hazardous substances – do not amount to conduct within the scope of their official duties. In addition, plaintiffs complain that because the officials failed to abate the contamination, it presents a continuous threat to their property. This, they contend, amounts to the continuing violation of federal law necessary to invoke Ex parte Young.

I.

The Eleventh Amendment provides that "[t]he judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. Amend. XI. A meritorious claim of Eleventh Amendment sovereign immunity, while not purely jurisdictional, is often dismissed under Fed. R. Civ. P. 12(b)(1). See 5A Wright & Miller, Federal Practice and Procedure § 1350 (1990 & 1999 Supp.).

The rulings in this case were predicated on two different procedural rules, 12(b)(1) and 12(b)(6). There is some distinction between them that the parties have not observed – for example, that Rule 12(b)(1) addresses jurisdictional objections and Rule 12(b)(6), failure to state a claim. We will first address the dismissal on quasi-jurisdictional grounds under Rule 12(b)(1) based on Eleventh Amendment immunity. See Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 267 (1997).

The Pennsylvania Department of Environmental Protection is an agency of Pennsylvania and as such, shares the sovereignty of the state. Accordingly, it may not be sued on claims arising under federal environmental laws in federal court by a citizen of Pennsylvania. See Allegheny County Sanitary Authority v. United States Environmental Protection Agency, 732 F.2d 1167, 1174 (3d Cir. 1984). We see no need to repeat the District Court's correct analysis applying Eleventh Amendment immunity to the state agency as well as to Wozniak and Holler in their official capacity.

We do not agree, however, that the dismissal should have been with prejudice. As we have said, "[a] dismissal for lack of jurisdiction is plainly not a determination of the

merits of a claim. Ordinarily, such a dismissal is 'without prejudice.'" Korvettes, Inc. v. Brous, 617 F.2d 1021, 1024 (3d Cir. 1980). See also In re: Orthopedic "Bone Screw" Products Liability Ligitation, 132 F.3d 152, 155 (3d Cir. 1997) (if a court lacks subject matter jurisdiction, disposition of the case is to be without prejudice.). A dismissal premised on Eleventh Amendment immunity implicates jurisdictional factors sufficient to convince us that these dismissals should have been without prejudice. See Warnock v. Pecos County, 88 F.3d 341, 343 (5th Cir. 1996).

Of course, a dismissal with prejudice is of no collateral consequence if no other court is able to entertain the claims. We note, however, that one Court of Appeals has concluded that federal court jurisdiction is not exclusive under the RCRA. See Davis v. Sun Oil Co., 148 F.3d 606, 612 (6th Cir. 1998). But see Alden v. Maine, ___ U.S. ___, No. 98-436, 1999 WL 412617 (June 23, 1999). Although we have not been called upon to decide that issue, and need not do so here, at a minimum – because of the jurisdictional uncertainty within this Circuit and state – the order of the District Court should be modified to state that the dismissal under Rule 12(b)(1) based on the Eleventh Amendment immunity of the Commonwealth defendants is "without prejudice."

We do agree, however, that the District Court properly found the Ex parte Young exception inapplicable. The plaintiffs' amended complaint recites past activity and hence, fails to set out claims amendable to prospective injunctive relief. Moreover, the decision and means utilized to enforce the environmental laws are discretionary actions, not the type of ministerial activity contemplated by Ex parte Young. See 209 U.S. at 158-59.

II.

In their brief to this Court, plaintiffs cite Scheuer v. Rhodes, 416 U.S. 232 (1974), for the proposition that a District Court should not dismiss damages actions against state officials sued in their individual capacities based only on information provided in the complaint. We do not agree with the plaintiffs' broad generalization, however. To our mind, Rule 12(b)(6) is applicable to claims of this nature as it is to any other.

Here the District Court examined the prolix amended complaint, which consisted of some 163 paragraphs setting forth evidentiary material in great detail. As noted, the District Court concluded that plaintiffs had not alleged derelictions by Wozniak and Holler in their individual capacities. Plaintiffs now direct our attention to certain paragraphs which, they assert, do single out actions taken by Wozniak and Holler outside or beyond their official capacity in dealing with the waste on Coombs' property.

We have closely examined those specific allegations, but conclude that the District Court was justified in reading the amended complaint as it did. However, in the interest of finality, we will assume that plaintiffs have asserted damage claims under the federal environmental statutes against Wozniak and Holler in their individual capacities and proceed to examine these claims.

We held in Allegheny County Sanitary Authority that the Clean Water Act provides a comprehensive plan of enforcement that limits remedies to those provided by the Act. See 732 F.2d at 1175 (examining 33 U.S.C. § 1365(a)). The RCRA and CERCLA are drafted with similar language. See 42 U.S. C. § 6972(a); 42 U.S.C. § 9659(a). Those statutes do not provide plaintiffs with a private cause of action against Wozniak and Holler in their individual

capacities. Hence, even if the amended complaint could be read as plaintiffs urge, those claims were properly dismissed under Rule 12(b)(6) with prejudice.

Although in some instances a dismissal under Rule 12(b)(6) is without prejudice and thus subject to amendment, a plaintiff may choose to stand on the allegations of the complaint. Plaintiffs have chosen that path – they appealed to this Court in 1997 relying on the language of their amended complaint, failed to request leave to amend after entry of the December 31, 1996 order; and maintained during oral argument before this Court that they continued to stand by those allegations.

We note, however, that some of the allegations directed against Wozniak and Holler seemingly do assert violations of state statutory and common law. As such, they are pendent claims which a District Court may dismiss when it disposes of the federal claims before it. See United Mine Workers v. Gibbs, 383 U.S. 715, 726-27 (1966); see also 28 U.S.C. § 1367©. The record in this case is not absolutely clear, but we gather that the District Court, in its amended order dismissing the state claims without prejudice, intended to exercise its discretion to decline jurisdiction over those pendent claims.

To clarify the record, we will remand this case to the District Court so that it may prepare appropriate orders:

(1) dismissing the plaintiffs' claims against the state agency and Wozniak and Holler in their official capacity without prejudice under Rule 12(b)(1);

(2) dismissing the plaintiffs' claim for damages against Wozniak and Holler in their individual capacity under the Clean Water

Act, RCRA, and CERCLA with prejudice under rule 12(b)(6); and

(3) declining to adjudicate the plaintiffs' common law and state claims under its pendent jurisdiction (if that is the District Court's intention).

III.

Plaintiff's also complain that the District Court erred in excluding the Commonwealth defendants from a contempt hearing. The District Court did so for two reasons: 1) because the Commonwealth defendants had been dismissed already from the case, and 2) because plaintiffs had failed to establish that the Commonwealth defendants violated any specific court order.

To establish civil contempt, plaintiffs must prove by clear and convincing evidence that (1) a valid order exited; (2) defendants knew of the order; and (3) defendants disobeyed the order. See Roe v. Operation Rescue, 54 F.3d 133, 137 (3d Cir. 1995). Plaintiffs, however, although they allege oral direction of the District Court, fail to point o an order of the type necessary to support civil contempt. See Harris v. City of Philadelphia, 47 F.3d 1342, 1349 (3d Cir. 1995). Accordingly, we find no error and affirm the order of the District Court excluding the Commonwealth defendants from the contempt hearing. The case will be remanded to the District Court for further proceedings in conformance with this opinion.

TO THE CLERK:

Please file the foregoing Opinion.

/s/ Ruggero J. Aldisert
United States Circuit Judge

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 98-3494

ROBERT W. GRINE, II;
JOANNE D. GRINE;
MARGARET M. GRINE

v.

WILLIAM R. COOMBS; BILLIE M. YOST; JACK W. SHRUM, et ux.; ROTOCAST PLASTIC; ESSEX ENV IND INC; TIONESTA BOR CNCL; RONALD HALL, President of Tionesta Borough Council, in and individual and official capacity; SCOTT DAUM, Borough Manager of Tionesta, in an individual and official capacity; COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION ("DEP"); GARY WOZNIAK, in an individual and official capacity as agent of the DEP; DANIEL HOLLER, Emergency Response Coordinator, Northwest Region, in an individual and official capacity, as agent of the DEP; RONALD W. COOMBS, Executor of the Estate of WILLIAM R. COOMBS, DECEASED; USA ENV PROTECTION; MICHAEL MCCABE, Regional Administrator, Region III, U.S. E.P.A.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

(D.C. No. 95-cv-00342)
District Judge: Honorable Sean J. McLaughlin

ARGUED BY COUNSEL
May 4, 1999

Present: Aldisert, Weis and Stapleton, Circuit Judges

JUDGMENT

This cause came to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel May 4, 1999.

On consideration of the order of the said District Court entered August 18, 1998, it is now here ordered and adjudged by this Court that the cause, be and same is hereby remanded to the said District Court for further proceedings in accord with the opinion of this Court.

ATTEST:

/s/ P. Danglos

Clerk

Sile

Dated: July 15, 1999

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 98-3494

ROBERT W. GRINE, II; JOANNE D. GRINE;
MARGARET M. GRINE

v.

WILLIAM R. COOMBS; BILLIE M. YOST; JACK W. SHRUM, et ux.; ROTOCAST PLASTIC; ESSEX ENV IND INC; TIONESTA BOR CNCL; RONALD HALL, President of Tionesta Borough Council, in and individual and official capacity; SCOTT DAUM, Borough Manager of Tionesta, in an individual and official capacity; COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION ("DEP"); GARY WOZNIAK, in an individual and official capacity as agent of the DEP; DANIEL HOLLER, Emergency Response Coordinator, Northwest Region, in an individual and official capacity, as agent of the DEP; RONALD W. COOMBS, Executor of the Estate óf WILLIAM R. COOMBS, DECEASED; USA ENV PROTECTION; MICHAEL MCCABE, Regional Administrator, Region III, U.S. E.P.A.

Robert W. Grine, II; Joanne D. Grine;
*Estate of Margaret M. Grine, Appellants
*Pursuant to F.R.A.P. 12(a)

BEFORE: BECKER, Chief Judge, SOLVITER, MANSMANN
GREENBERG, SCIRICA, NYGAARD, ALITO, ROTH
McKEE, RENDELL, ALDISERT*, WEIS*, and
STAPLETON*, Circuit Judges

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*As to panel rehearing only.

*As to panel rehearing only.

*As to panel rehearing only.

APPENDIX B

SUR PETITION FOR PANEL REHEARING
WITH SUGGESTION FOR REHEARING *EN BANC*

The petition for rehearing filed by Appellants and having been submitted to the judges who participated in the decision of this Court, and to all other available circuit judges in active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court *en banc*, the petitions for rehearing are DENIED.

BY THE COURT:

/s/ Becker
Chief Judge

DATED: OCT 01, 1999

CLC/CC: JSH
MLW

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ROBERT W. GRINE, II, et al.,	)	
Plaintiffs,	)	
vs.	)	Civil Action No. 95-342 Erie
WILLIAM R. COOMBS, et al.,	)	
Defendants	)	

MEMORANDUM OPINION

McLAUGHLIN, District J.

Presently pending before the Court in the above-captioned matter is a motion by the Plaintiffs seeking reconsideration of this Court's Memorandum Opinion and Order of December 31, 1996 and a separate order entered on February 9, 1998. For the reasons set forth below, we will amend our prior order of December 31, 1996 such that Plaintiffs' state law claims against the Commonwealth Defendants are dismissed without prejudice. In all other respects, Plaintiffs' motion for reconsideration will be denied.

I. PROCEDURAL HISTORY

Plaintiffs in this action are property owners in Tionesta Borough, Pennsylvania. They claim that their

property has been contaminated with various hazardous chemicals and pollutants at the hands of their up-gradient neighbors, William R. Coombs and Billie M. Yost. On April 2, 1996, Plaintiffs filed a nine-count Amended Complaint, in which they named as Defendants Coombs, Yost, and various other public and private individuals and entities. Among the nine causes of action asserted in the Amended Complaint are federal law claims under the Resource Conservation and Recovery Act of 1976 ("RCRA"), 42 U.S.C.A. §§6901 *et se.* (West 1995), the Federal Water Pollution Control Act ("Clean Water Act" or "CWA"), 33 U.S.C.A. §§1251, *et seq.* (West 1986), and the Comprehensive Environmental Response, Compensation, and Liabilities Act of 1980 ("CERCLA"), 42 U.S.C. §§9601 *et seq.* (West 1995), as amended by the Superfund Amendments and Reauthorization Act of 1986.

By Memorandum Opinion and Order of December 31, 1996, this Court dismissed all of the claims against the Commonwealth of Pennsylvania Department of Environmental Protection ("DEP") and two of its agents, Defendants Daniel Holler and Gary Wozniak (collectively referred to the "Commonwealth Defendants"). Although the Commonwealth Defendants asserted numerous bases for dismissal, the Court ultimately disposed of the claims on Eleventh Amendment immunity grounds. With respect to the claims against the DEP itself, the Court found that the DEP, as an arm of the Commonwealth, was immune from suit in federal court under the Eleventh Amendment. We determined, in light of the Supreme Court's decision in Seminole Tribe of Florida v. Florida, -- U.S. – 116 S. Ct. 1114 (1996), that Congress's attempt to abrogate Eleventh Amendment immunity under the federal environmental laws was not done pursuant to any valid exercise of constitutional authority. Therefore, we reasoned, the Commonwealth's sovereign immunity – having been neither waived by the Commonwealth nor validly abrogated by Congress –

remained intact. Plaintiffs do not appear to challenge this portion of the Court's ruling.

We then considered the potential liability of Defendants Holler and Wozniak. Initially, we determined that the claims against Holler and Wozniak were essentially directed at actions taken by them in their official capacity as agents of the DEP. We concluded that the Commonwealth was the real party in interest and that, consequently, the Eleventh Amendment barred any recovery by Plaintiffs for retrospective relief or damages under their federal causes of action.

The Court next considered whether any prospective relief was appropriate under the doctrine of Ex parte Young, 209 U.S. 123 (1908). We considered the nature of Plaintiffs' claims by examining the allegations in their Amended Complaint. In particular, we noted that Plaintiffs had not identified any prospective unconstitutional conduct or continuing violations of federal law on the part of the Commonwealth officials. Instead, all averments relating to the officials' alleged misconduct appeared to involve past conduct. To the extent that Plaintiffs' claims were premised upon the Commonwealth Defendants' continuing failure to adequately investigate and/or remediate the alleged contamination, we concluded that Ex parte Young did not provide a basis for prospective relief under the federal environmental statutes at issue. See Proffitt v. Davis, 707 F. Supp. 182, 187 (E.D. Pa. 1989) (recognizing discretionary nature of agency's decision not to pursue a particular course of enforcement and holding that citizen suits provisions of RCRA and CWA did not provide jurisdictional basis for action seeking to compel Secretary of DER to enforce compliance with those statutes).

Finally, with respect to Plaintiffs' state law claims, we noted that the Eleventh Amendment also bars any suit in federal court against the Commonwealth for alleged

violations of state law. Further, the narrow exception of Ex parte Young does not apply to Plaintiffs' state law claims. Based on the foregoing reasons, we dismissed the Plaintiffs' claims against the Commonwealth Defendants with prejudice by order dated December 31, 1996. Plaintiffs subsequently sought to appeal the ruling, but the Third Circuit Court of Appeals dismissed the appeal as premature.

Thereafter, on December 18, 1997, Plaintiffs filed a motion for an order adjudging the Commonwealth Defendants and the United States Environmental Protection Agency[1] in civil contempt ("contempt motion"). This motion is generally based on the governmental Defendants' alleged failure to turn over documents and information to which the Plaintiffs claim they are legally entitled. By order dated February 9, 1998 this Court directed that the hearing on Plaintiffs' civil contempt motion would be limited in scope to allegations concerning the conduct of the EPA and not the Commonwealth Defendants, as the Commonwealth Defendants had previously been dismissed from the case on Eleventh Amendment immunity grounds.

Meanwhile, on February 23, 1998, Plaintiffs filed the instant motion for reconsideration of both the December 31, 1996 order dismissing the Commonwealth Defendants from the case and the February 9, 1998 order limiting the scope of the hearing on Plaintiffs' contempt motion. Plaintiffs represent that the instant motion for reconsideration is grounded upon:

> Intervening legal developments in the form of a Supreme Court decision

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[1] Plaintiffs filed a claim against the United States EPA under the Freedom of Information Act, 5 U.S.C.A. §552 (West 1996 and 1998 Supp.). The motions relative to the claims against the EPA are dealt with in a separate memorandum opinion.

> which challenges the propriety of the Court's original ruling, and the discovery of new evidence that the DEP withheld from Plaintiffs the data necessary for validation of test results, in the fac[e] of its representation to the Court and to Plaintiffs that all information relating to contaminants on the Coombs and Grine sites was made accessible to Plaintiffs.

(See Pl.s' Mot. at pp. 2-3.) In addition, Plaintiffs raise various procedural objections to the Court's decision to dismiss the Commonwealth Defendants.

II. TIMELINESS AND STANDARD OF REVIEW

As a preliminary matter, we must determine the correct procedural framework for addressing the instant motion. The Commonwealth Defendants contend that reconsideration is only proper, if at all, pursuant to Rules 59(e)[2] or 60(b)[3] of the Federal Rules of Civil Procedure.

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[2] Rule 59(e) provides as follows:

> **(e) Motion to Alter or Amend Judgment.** Any motion to alter or amend a judgment shall be filed no later than 10 days after entry of the judgment.

Fed. R. Civ. P. 59(e).

[3] Rule 60(b) provides, in relevant part:

> **(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc.** On motion and upon such terms as are just, the court may relieve a party of a party's legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence

Defendants further contend that, under either rule, the motion for reconsideration is untimely. Plaintiffs' motion was filed more that 13 months after the entry of the original order which is now being challenged. Rule 59(e) requires that a motion to amend or alter a judgment be brought within ten days after entry of the judgment. See Fed. R. Civ. P. 59(e). Rule 60(b) requires that motions be brought "within a reasonable time" and, for motions based upon subsections (1), (2) or (3), within a year of entry of the judgment. See Fed. R. Civ. P. 60(b).

However, both Rules 59(e) and 60(b) apply only where the subject order is final, as opposed to interlocutory. See Confer v. Custom Eng. Co. Employee Health Benefit Plan, 760 F.2d 41 (3d Cir. 1991). The Court's order of December 31, 1996 disposed only of claims against some, but not all, of the named Defendants. Therefore the operative rule here is Rule 54(b):

> **(b) Judgment Upon Multiple Claims or Involving Multiple Parties.** When ore than one claim for relief is presented in an action, ... or when multiple parties are involved, the court may direct the entry of a final judgment

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> which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgement is void; ... or (6) any other reason for justifying relief form the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation.

Fed. R. Civ. P. 60(b).

> as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

Fed. R. Civ. P. 54(b). Because the order of December 31, 1996 was never certified by this Court as a final judgment, the order remained interlocutory[4] and, by the express terms of this rule, is subject to revision at any time prior to final adjudication of all the claims and the rights and liabilities of all the parties. Fed. R. Civ. P. 54(b). See Confer, 760 F. Supp. At 77 (where defendants sought reconsideration to a partial judgment in favor of some but not all plaintiffs, the only vehicle for reconsideration was Rule 54). We therefore conclude that the motion for reconsideration is timely under Rule 54(b).

The next issue is the standard of review which ought to be applied to the instant motion. Although "[t]he standard for granting a motion for reconsideration under Rule 54 is undoubtedly less rigid than under 60(b)," Confer, 760 F. Supp. At 77 (citing Fed. R. Civ. P. 60(b) Advisory

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[4] Indeed, when the Plaintiffs sought to take an appeal from the decision, the appeal was considered interlocutory and was therefore dismissed by the Third Circuit Court of Appeals for lack of jurisdiction.

Committee's Notes; Farr Man & Co., Inc. v. M/V Rozita, 903 F.2d 871 (1st Cir. 1990)), courts attach "considerable import" to the rendering of a judgment, whether or not it is final. See id. Accordingly, reconsideration of our prior decision is only appropriate in order to correct manifest errors of law or fact or to consider newly discovered evidence relating to the prior decision. Id. (citing Harsco Corp. v. Zlotnicki, 779 F.2d 906 (3rd Cir. 1985)).[5] With this standard in mind, we turn to the substance of Plaintiffs' motion for reconsideration.

III. DISCUSSION

Plaintiffs represent that their motion is grounded upon "intervening legal developments" which cast doubt on the propriety of this Court's previous ruling. They also claim to have new evidence indicating that the DEP has withheld data which Plaintiffs feel was necessary in order for them to verify the soil, water, and sludge testing performed by the DEP both on their property and on the up-gradient Coombs property. Finally, Plaintiffs have lodged various objections which can broadly be described as procedural objections. We will first consider Plaintiffs' arguments as they relate to our ruling of December 31, 1996 by which we dismissed the claims against the Commonwealth Defendants. We will then consider Plaintiffs' arguments as they relate to

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[5] The same standard would apply if we were to entertain reconsideration under the "law of the case" doctrine. See Public Interest Research Group of New Jersey, Inc. v Magnesium Elektron, Inc., 123 F.3d 111, 116-17 (3d Cir. 1997) (notwithstanding the "law of the case" litigation where "extraordinary circumstances" exist, e.g. where: (1) new evidence is available; (2) a supervening new law has been announced; or (3) the earlier decision was clearly erroneous and would create manifest justice).

our February 9, 1998 ruling defining the scope of the contempt hearing.

1. Plaintiffs' Motion for Reconsideration of the Order of December 31, 1996

We first consider whether supervening "new law" requires a modification of the December 31, 1996 opinion and order. Although Plaintiffs base their motion in part upon "intervening legal developments," it is not clear in what respect Plaintiffs feel the relevant law underlying our previous decision has changed. Plaintiffs refer the Court to a recent Supreme Court decision, Idaho v. Coeur d'Alene Tribe of Idaho, -- U.S. -- , 117 S. Ct. 2028 (1997). That case involved a lawsuit brought by a federally recognized Indian tribe against the State of Idaho, various state agencies, and various state officials in their individual capacities. The tribe alleged ownership in submerged lands and the bed of a lake and its tributaries which were within the 1873 boundaries of its reservations. A majority of the Court ruled that the Eleventh Amendment barred a federal court from hearing the tribe's claim. Insofar as the claims were asserted against state officials in their individual capacities, a majority held that no relief was available under the doctrine of Ex parte Young.

In Coeur d'Alene, Justice Kennedy, as author of the principal decision, sought to articulate an individualized standard for applying the doctrine of Ex parte Young. He advocated an approach that would consider, on a case-by-case basis, "the real affront to a State of allowing a suit to proceed" on the basis of prospective relief. 117 S. Ct. at 2038. However, only Justice Rhenquist adopted the approach outlined by Justice Kennedy. Three Justices – O'Connor, Scalia and Thomas – concurred in the judgment but declined to join in that portion of the principal decision

which advocated a "case-by-case" (rather than a ruled-based) approach to Ex parte Young. Accordingly, there appears to be a consensus among the lower federal courts that, following Coeur d'Alene, "a majority of the [Supreme] Court would continue to apply the rule of Ex [P]arte Young as it has been traditionally understood." See Earles v. State Bd. of CPAs of Louisiana, 139 F.3d 1033, 1039 (5th Cir. 1998) (citing cases), reh'g and suggestions for re'g en banc denied, No. 97-30159, -- F.3d – (5th Cir. 1998) (Table Case). In sum, then, we do not perceive any significant change in the law, have not specified how the recent Supreme Court decision requires a different result. They appear to rely on Coeur d'Alene for the proposition that, when no state forum is available to vindicate federal interests, a special obligation is placed upon district courts to ensure the supremacy of federal statutory and constitutional law. Thus, Plaintiffs reason, prospective relief under Ex Parte Young is particularly appropriate here, since their federal claims cannot be entertained in state court. (Pl.'s Mot. For Reconsideration at 16.) However, we note once again that the part of the principal decision on which Plaintiffs rely, 117 S. Ct. at 2035, was adopted only by Justices Rhenquist and Kennedy. As such, it does not constitute a majority ruling or binding precedent.

B.

Plaintiffs also contend that the Court erred in finding that there was no basis for relief under the doctrine of Ex Parte Young. They claim that Defendants Holler and Wozniak have committed on-going violations of federal law for which prospective relief is appropriate, *to wit:*

> ... agents of the DEP, with knowledge that listed hazardous substances were detected in the drums, secretly assisted Defendant Coombs in

> moving them off-site, without a permit, to his home in McDonald, PA. No administrative on-the-record order authorized this illegal transport of hazardous materials. Transport of unpermitted and listed hazardous materials is an ongoing violation of federal law ...

(Pl.'s Mot. For Reconsideration at 17.)

We find this proffer insufficient as a basis for reconsideration. Even assuming *arguendo* the truth of the allegation, it is not clear in what respect Plaintiffs can be said to have suffered injury as a result of the alleged transportation of offensive barrels *from* Coomb's campsite in Tionesta Borough *to* Coomb's residence in McDonald, Pennsylvania. Given that the basis of this entire lawsuit is the alleged presence of hazardous substances on the Coombs campsite, which (according to Plaintiffs) have allegedly contaminated their down-gradient property, the removal of the alleged hazardous substances from the campsite would appear to benefit Plaintiffs, not harm them. To the extent that Plaintiffs are complaining that the alleged movement of the barrels was a *per se* violation of RCRA because it constituted a transfer of hazardous waste without a permit, Plaintiffs have not demonstrated that they have standing to pursue such a claim. "Congress' provision for citizens suits does not, in itself, establish Article III standing." Public Interest Research Group of Nw Jersey, Inc. v. Magnesium Elektron, Inc. (hereinafter "PIRG of New Jersey"), 123 F.3d 111, 120 (3d Cir. 1997) (quoting Sierra Club v. Simkins Indus., Inc., 847 F.2d 1109, 1113 (4th Cir. 1988)). In order to successfully assert a claim under the citizen suit provisions of the federal environmental laws, a plaintiff must establish that he or she has standing by demonstrating: (i) an injury in fact, i.e. an invasion of a legally protected interest which is

concrete and particularized and actual or imminent; (ii) a causal link between the defendant's conduct and the injury, such that the conduct is "fairly traceable" to that conduct; and (iii) the likelihood that judicial relief will redress the plaintiff's injury. See PIRG of New Jersey, 123 F.3d at 117, 119. Assuming for the moment that Plaintiffs can prove that the DEP agents secretly assisted Defendant Coombs in removing toxin-containing barrels to another location remote from Plaintiffs' property, they have not demonstrated or even alleged any injury or threat of injury resulting from this alleged unpermitted transfer.[6] PIRG of New Jersey, 123 F.3d at 120 (Clean Water Act does not authorize private causes of action against polluters absent some showing of injury or threat of injury); Pape v. Lake States Wood Preserving, Inc., 948 F. Supp. 697, 700 (W.D. Mich. 1995) (plaintiff had no standing to bring RCRA citizen suit where he lived 150 miles from site of defendant's alleged pollution and failed to demonstrate threat of imminent personal injury), aff'd, 98 F.3d 1342, 1996 WL 571306 (6th Cir. 1996) (TABLE NO. 95-2266) (noting that plaintiff had not provided any evidence to support his allegation that the defendant polluted the area surrounding its property). See also Lujan v. Defenders of Wildlife, 504 U.S. 555, 566-67 (1992) (plaintiffs had no standing to enforce Endangered Species Act where they lacked any connection to the situs of injury). C.f. Supporters to Oppose Pollution, Inc. v. Heritage Group, 973 F.2d 1320, 1322 (7th Cir. 1992) (citizens' group had standing to pursue RCRA claim where it represented persons living close to the alleged situs of pollution who

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[6] To the extent that Plaintiffs' injury is premised upon the DEP's alleged failure to adequately investigate and/or to preserve this evidence, such a claim is insufficient as a basis for reconsideration. As we previously discussed in our December 31, 1996 memorandum opinion, the citizen suit provisions of RCRA, CERCLA and CWA do not provide a mechanism for challenging the DEP's investigative or regulatory measures.

were subject to potential injury), rh'g and reh'g en bac denied, Octobr 5, 1992.

C.

Plaintiffs have also raised several procedural objections to the court's December 31, 1996 decision. They claim, for example, that they have been denied due process inasmuch as they were never put on notice that the Court would entertain a dismissal under Fed. R. Civ. P. 12(b)(1). Plaintiffs suggest that they were unfairly surprised because the Commonwealth Defendants' original motion to dismiss never cited Federal Rule 12(b)(1) as a basis for dismissal. This assertion borders on absurd and is easily disposed of. In their original papers for moving for dismissal, the Commonwealth Defendants spelled out several grounds on which they believed dismissal was warranted. Among other things, the Commonwealth Defendants argued that they were immune from suit in federal court under Eleventh Amendment to the U.S. Constitution and that Plaintiffs failed to identify a viable cause of action against them in the Amended Complaint. Plaintiffs responded to these arguments in their brief opposing the motion to dismiss. It is unfathomable that Plaintiffs can now argue that they were surprised that the Court considered the issue of Eleventh Amendment immunity. And, while the Commonwealth Defendants may not have specifically cited Fed. R. Civ. P. 12(b)(1) in their motion to dismiss, it should not have been surprising to Plaintiffs that the court would analyze the Eleventh amendment issue under that particular rule. Although the Eleventh Amendment is not strictly jurisdictional, it creates a sovereign immunity which partakes of jurisdictional qualities. See, e.g., Sullivan v. Barnett, 139 F.3d 158, 179 (3d Cir. 1998) ("At this juncture, we raise an Eleventh Amendment sovereign immunity issue sua sponte as it is relevant to our jurisdiction over the

Commonwealth Defendants."), pet. for cert. filed, June 11, 1998. Thus, federal courts have treated Eleventh Amendment immunity as a jurisdictional issue that can be raised sua sponte, even for the first time at appellate level. See Wheeling & Lake Erie Rv. Co. v. Public Utility Comm'n of Commonwealth of Pa., 141 F.3d 88, 91 (3d Cir. 1998); Sullivan, 139 F.3d at 179 (citing cases); College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 131 F.3d 353, 365 (3d Cir. 1997) ("Because the [Eleventh Amendment] immunity issue 'sufficiently partakes the nature of a jurisdictional bar,' ... it is an issue that may be raised at any time during the pendency of the case.") (internal citation omitted), pet. for cert. filed, 67 U.S.L.W. 3084 (July 17, 1998). Furthermore, numerous federal courts have entertained motions to dismiss on sovereign immunity grounds under the rubric of Fed. R. Civ. P. 12(b)(1). See, e.g., Williams v. United States, 50 F.3d 299, 204-05, 307 (4th Cir. 1995); Union Pacific R.R. Co. v. Burton, 949 F. Supp. 1546, 1552 (D.Wyo. 1996); Hines v. Irvington Counseling Ctr., 933 F. Supp. 382, 387-88 (D.N.J. 1996) (addressing federal government's sovereign immunity); Taylor v. Commonwealth of Virginia, Dept. Of Transportation, 170 F.R.D. 10, 13 (E.D. Va. 1996); Radeschi v. Commonwealth of Pennsylvania, 846 F. Supp. 426, 418-19 (E.D. Pa. 1993). See also 5A Charles Alan Wright and Arthur R. Miller, Federal Practice & Procedue §1350 (1990 & 1998 Supp.) (Rule 12(b)(1) motion to dismiss for lack of jurisdiction over subject matter may also be appropriate when plaintiff's claim is barred by sovereign immunity). Moreover, even if it could be said that this Court erred in analyzing the Eleventh Amendment immunity issue under Rule 12(b)(1), the error would be a harmless one of form over substance. Plaintiffs were aware of the Defendants' Eleventh Amendment immunity argument and responded to it as they saw fit in their oppositional brief. In addition, Plaintiffs received the benefit of certain procedural safeguards. In addressing the Commonwealth Defendants' motion to dismiss, the Court

interpreted the averments in Plaintiffs' amended Complaint as true and drew all reasonable factual inferences from the complaint in the light most favorable to them. See Radeschi, 846 F. Supp. At 419 (court may dismiss an action for lack of subject matter jurisdiction based on facial challenge to complaint only if it affords the plaintiff the safeguard of accepting all allegations of the complaint as true, drawing reasonable factual inferences from the complaint in plaintiff's favor, and only if it appears to a certainty that the pleader will not be able to assert a colorable claim of subject matter jurisdiction). The Court also recognized that the Commonwealth Defendants, as proponents of Eleventh Amendment immunity, bore the burden of proving the applicability of that doctrine.[7] In short, Plaintiffs were plainly put on notice of the Eleventh Amendment immunity argument and cannot be heard to claim unfair surprise or other prejudice.

Plaintiffs also generally object that the Court, prior to entering a dismissal on the grounds of rule 12(b)(1), was required to hold an evidentiary hearing to resolve disputed issues of material fact. The Third Circuit has recognized that "when there is a factual question about whether a court has jurisdiction, the trial court may examine facts outside the pleadings and thus 'the trial court may proceed as it never could under 12(b)(6) or Fed. R. Civ. P. 56 ... in such a circumstance, a trial court 'is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case.'" Robinson v. Dalton, 107 F.3d 1018, 1021 (3d Cir. 1997) (internal citation omitted). However, in light of the procedural posture of this case, Plaintiffs' contention that the Court was required to hold an evidentiary hearing is misplaced. The Court's decision was not premised upon resolution of any factual issues disputed by the parties.

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[7] See Op. of 12/31/96 at 12 n. 5 (citing Christy v. Pennsylvania Turnpike Comm'n, 54 F.3d 1140, 1144 (3d Cir. 1995), cert. denied, -- U.S. --, 116 S. Ct. 340 (1995)).

Rather, the Court's dismissal order was based upon purely legal principles which, we concluded, flowed ineluctably from the manner in which the Plaintiffs had pleaded their Amended Complaint.[8]

Plaintiffs further contend that this Court's dismissal of their claims with prejudice was erroneous, given that the dismissal was premised on jurisdictional grounds. The Court acknowledges that ordinarily, a dismissal based on the lack of subject matter jurisdiction per Fed. R. Civ. P. 12(b)(1) is without prejudice and does not address the merits of the plaintiff's claims. See In re Orthopedic "Bone Screw" Products Liability Litigation, 132 F.3d 152, 155 (3d Cir. 1997). Here, however, a dismissal without prejudice serves no purpose, at least insofar as Plaintiffs' federal claims

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[8] Some of the purported factual disputes highlighted by Plaintiffs in their motion for reconsideration concern new averments of misconduct allegedly based on new evidence. For example, Plaintiffs claim to have uncovered new "material" evidence showing that the DEP agents have failed to produce the complete and unedited file relating to soil and/or water samples taken from their own property as well as from Coombs's property. They characterize this conduct as deliberate attempt to conceal, lose or obscure testing events and the results of those tests. Plaintiffs claim, among other things, that Defendants Holler and Wozniak failed to take and preserve environmental samples, prematurely aborted their investigation before meaningful evidence of the source of the contamination could be found, concealed vital evidence relative to the source of the contamination, and destroyed or altered evidence relating to sample procurement. Even accepting these allegations as true for the moment, Plaintiffs have not explained how they give rise to a cause of action under RCRA, CWA or CERCLA (or their pendent state law claims), nor have they sought leave to amend their complaint to plead any other appropriate cause of action. The mere allegation of newly uncovered misconduct does not necessarily persuade the Court that its prior dismissal was erroneous unless Plaintiffs can demonstrate that the newly discovered misconduct provides them with a potentially viable cause of action.

against the Commonwealth Defendants are concerned. Federal district courts have exclusive jurisdiction over private citizens' suits brought under RCRA, the Clean Water Act and CERCLA. See 42 U.S.C. §6972(a) (RCRA); 42 U.S.C. §9659(b)(1) and (c) (CERCLA); 33 U.S.C. §1365(a) and (c)(1) (CWA). We have determined, based on the allegations set forth in the Amended Complaint, that the Eleventh Amendment protects the Commonwealth Defendants from defending against this suit in federal court. Because Plaintiffs cannot bring their federal claims elsewhere, those claims are effectively barred. Dismissal of those claims without prejudice therefore serves no meaningful purpose. Nevertheless, we will amend our prior order of December 31, 1996 such that the dismissal of Plaintiffs' state law claims against the Commonwealth Defendants is without prejudice.

2. Plaintiffs' Motion to Reconsider Order of February 9, 1998

On January 17, 1998, Plaintiffs filed a motion requesting this Court to enter an order adjudging both the EPA and the Commonwealth Defendants in civil contempt ("contempt motion"). By order dated February 9, 1998, the Court directed that the upcoming hearing on Plaintiffs' contempt motion would be limited to consideration only of the conduct of the EPA. The Court excluded the Commonwealth Defendants from the scope of the hearing on the ground that the Court lacked jurisdiction over those Defendants following their dismissal from the case.

Plaintiffs claim, however that they have discovered new evidence which purportedly shows that the DEP withheld and/or destroyed data relating to its investigation of the Plaintiffs' complaints. Plaintiffs claim that they were entitled to this data and that it was needed in order for them

to confirm the results of various testing performed by the DEP officials. Ultimately, this discovery does not relate to any viable cause of action as originally pleaded in the Complaint or Amended Complaint. Therefore, it does nothing to advance this Court's jurisdiction over the Commonwealth Defendants.

Moreover, Plaintiffs cannot establish that the Commonwealth Defendants have violated a specific order of this Court. In order to establish the propriety of civil contempt, a plaintiff must prove three elements by clear and convincing evidence: (1) that a valid order of the court existed; (2) that the defendants had knowledge of the order; and (3) that the defendants disobeyed the order. Roe v. Operation Rescue, 54 F.3d 133, 137 (3d Cir. 1995). The terms of the order must be sufficiently clear and precise to give fair warning to the contemnor that he or she is in violation of the order. Harris v. City of Philadelphia, 47 F.3d 1342, 1349 (3d Cir. 1995) ("Specificity in the terms of consent decrees is a predicate to finding of contempt ... because 'a person will not be held in contempt ... unless the order has given him fair warning.'") (internal citation omitted), reh'g denied (March 16, 1995). Here, Plaintiffs have not demonstrated, or even alleged, that the Commonwealth Defendants are in violation of any court order.[9] Instead, Plaintiffs claim that counsel for the DEP made misrepresentations to this Court when, during a pretrial conference, he stated that he had voluntarily produced all

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[9] Although the Plaintiffs' contempt motion and motion for reconsideration loosely refer to violations of this Court's "orders" or "directives" to produce documentation (see Pl.'s Mot. For Order Adjudging Def. in Civil Contempt [Doc. No. 133] at 4; Pl.'s Mot. for Reconsideration [Doc. No. 151] at 12), Plaintiffs do not actually identify any specific order compelling the Commonwealth Defendants to disclose the information now sought by them. For its part, this Court is not aware of any such order.

relevant documentation in the agency's file concerning the Plaintiffs' case:

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> THE COURT: Well, then, it seems to me that the injunction hearing which we had previously scheduled for November 19th, given the fact that you have injunctive and damage claims and you have a request for jury trial, should not take place. And that is to say that this matter should be set down on our jury term, which raises this issue. I assume that any discovery, to the extent that there has been any discovery in the case, has been directed primarily at the issues which implicate the injunctive aspect of the case, is that correct?
>
> [Counsel for the EPA]: I believe so, judge.
>
> [Plaintiffs' counsel]: There has been no discovery taken.
>
> [Counsel for the Commonwealth Defendants]: *We sat here for a day, we gave the [P]laintiffs' counsel all of the records from our files .. even though I don't think this court had the authority to direct them, we volunteered to do it, we did. They had a whole day's worth, sitting here, getting documents. I don't know what else we have. We have given them everything.*

(Tr. Of 11/13/96 Pretrial Conference [Doc. No. 101] at 4-5 (emphasis supplied).)

The foregoing language does not, in our opinion, constitute any potential basis for finding the Commonwealth Defendants in civil contempt. At most, assuming the truth of Plaintiffs' averments, the Commonwealth Defendants failed to follow through with a decision voluntarily produce certain documentation which they were under no formal obligation to produce.[10] Plaintiffs have not cited any authority for the proposition that such conduct can serve as a basis for civil contempt. Although they have referred to Telluride Management Solutions, Inc. v. Telluride Investment Group, 55 F.3d 463 (9th Cir. 1995), that case is factually distinguishable in material respects and does not provide persuasive authority for the relief sought here.

IV. CONCLUSION

In sum, for the reasons previously stated, the Court will grant the Plaintiffs' motion for reconsideration and amend its Order of December 31, 1996 to reflect that Plaintiffs' state law claims against the Commonwealth Defendants are dismissed without prejudice. In all other respects, the Plaintiffs' motion for reconsideration is denied.

An appropriate order follows.

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[10] We note that no formal discovery had been served on the Commonwealth Defendants and hence, there was no outstanding order from this Court compelling the disclosure of any documentation. Nor did Plaintiffs ever attempt to compel production by way of a subpoena duces tecum. Alternatively, Plaintiffs might have sought to obtain the desired documentation by enforcing their state law remedies under the Pennsylvania "Right to Know" Act. See PA. STAT. ANN. tit. 65, §§66.1 *et seq.* (West 1959 and 1998 Supp.).

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ROBERT W. GRINE, II, et al.,	)	
	)	
Plaintiffs,	)	
	)	Civil Action No. 95-342
vs.	)	Erie
	)	
WILLIAM R. COOMBS, et al.,	)	
	)	
Defendants.	)	

ORDER

AND NOW, this 17th day of August, 1998, IT IS HEREBY ORDERED that Plaintiffs' Motion [Doc. No. 151] for Reconsideration is GRANTED and the Court's Order of December 31, 1996 is amended to the following extent: the Order will reflect that Plaintiffs' state law claims against the Commonwealth Defendants will be dismissed without prejudice. In all other respects, Plaintiffs' Motion [Doc. No. 151] for Reconsideration is DENIED.

IT IS FURTHER ORDERED that, upon consideration of the Commonwealth Defendants' Motion [Doc. No. 158] for Entry of Final Judgment Pursuant to Fed. R. Civ. P. 54(b) and the Plaintiffs' brief in opposition thereto, said motion is GRANTED. The Court finds that there is no just reason for delay and that entry of final judgment is warranted for the reasons set forth in the Defendants' motion and supporting brief.

IT IS THEREFORE ORDERED that the Court's Order of December 31, 1996, as amended herein, be entered as a final judgment in accordance with Rule 54(b) of the Federal Rules of Civil Procedure.

s/Sean J. McLaughlin
United States District Judge

Cm: All counsel of record.TH